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[www.montgomerycountymd.gov/mc/council/hearing.html](http://www.montgomerycountymd.gov/mc/council/hearing.html)**

## HEARING EXAMINER'S REPORT AND RECOMMENDATION

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## **I. SUMMARY**

The subject property is located within the Bethesda Central Business District (CBD) planning area. The site is irregular in shape and consists of three lots located on the north side of Montgomery Lane and the west side of West Lane in downtown Bethesda. The property is currently improved with single-family residential structures now used for commercial purposes. The property is located 1,000 feet southwest of the Bethesda Metro Station and is located within the Bethesda Transit Station Residential District as described in the Bethesda CBD Sector Plan.

The Applicant proposes to build a multifamily residential building of up to 50 dwelling units. The building is proposed to have 4-story and 6-story wings. The 4-story wing will extend along the southern and western portions of the site. The 6-story wing will extend along the northern end of the site. West Lane will serve as the sole point of vehicular access. The current width of West Lane is very narrow and the road is considered to be in poor condition.

The Applicant is unclear about the paved width to be provided on West Lane and the record contains conflicting evidence on this point. Without an adequate access point, the application is premature. The record also reflects some compatibility problems with the building mass and is unclear about minimum density “green” elements of the building and road dedication.

Given a lack of specificity on these issues, it is recommended that the development plan not be approved and the application be deferred until the vehicular access and other concerns are resolved. It is also recommended that the matter be remanded to the Office of Zoning and Administrative Hearings for further proceedings.

## **II. STATEMENT OF THE CASE**

Local Map Amendment (LMA) Application No. G-843, filed on December 5, 2005, requests reclassification from the R-60 (Residential 6,000 square feet) Zone to the TS-R (Transit Station-Residential)

Zone of 23,260 square feet of land known as Lots 24, 25 and 27, Block 13 of the Edgemoor Subdivision, and located at 4903 Montgomery Lane and 4831 and 4833 West Lane, Bethesda, Maryland, in the 7th Election District.

The Technical Staff of the Maryland-National Capital Park and Planning Commission (“MNCPPC”) initially reviewed the application a short time after it was filed. In a report dated April 5, 2006, the staff recommended denial. The four members of the Planning Board considered the matter on April 20, 2006 and unanimously recommended denial.

The Applicant subsequently revised the development plan and the revised plan was reviewed by the Technical Staff. In a report dated October 25, 2006, the staff recommended approval. The full Planning Board considered the revised application on November 13, 2006 and unanimously recommended approval.

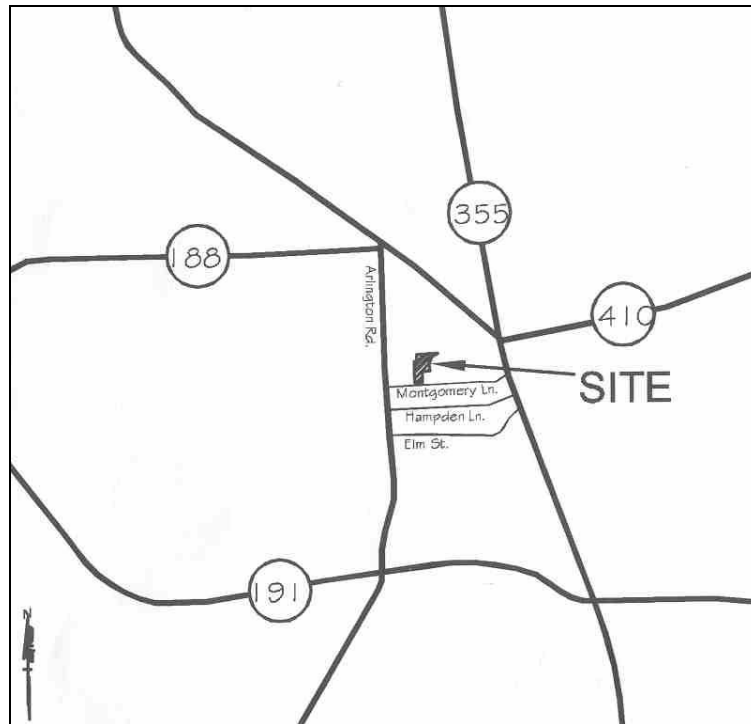
A public hearing on the application was conducted on December 5, 2006 and testimony was presented both in support of and in opposition to the application. The record was held open to permit the parties an opportunity to submit additional materials. The record closed on January 12, 2007.

### **III. FINDINGS OF FACT**

For the convenience of the reader, the findings of fact are grouped by subject matter. Where there are conflicts in the evidence, these conflicts are resolved under the preponderance of the evidence test.

#### **A. SUBJECT PROPERTY**

The subject property is generally located within the Bethesda Chevy-Chase Planning Area and more specifically within the Bethesda CBD Sector Plan. It is located to the southwest of the intersection of Wisconsin Avenue and Old Georgetown Road and East-West Highway. The location of the site and its general vicinity are depicted below.



The site is irregularly shaped and consists of three lots located on the north side of Montgomery Lane and the west side of West Lane in downtown Bethesda. The subject property contains a gross tract area of 28,537 square feet and is currently improved with single-family residential structures now used for commercial purposes. Lot 24 is located on the west side of West Lane. Lot 25 is located on the west side of West Lane. Lot 27 is located on the north side of Montgomery Lane two lots east of the intersection of Montgomery Lane and Arlington Road.

The property is located 1,000 feet south west of the Bethesda Metro Station and is within the Bethesda Transit Station Residential District (BTSRD). The property possesses about 233 feet in depth and 175 feet in width as measured at its deepest and widest points. The site rises to a high point at its northeast corner at 338 feet above sea level. The property then slopes downward in a southwest direction about 4 to 5% to a low point of 328 feet above sea level. Opposition representatives John F. Wolf, Jr. and Theodore P. Chipouras own two adjoining and confronting lots –lots 26 and 22 – respectively. The location, shape and immediate environs of the site are depicted on the next page.



## B. ZONING AND PLANNING HISTORY

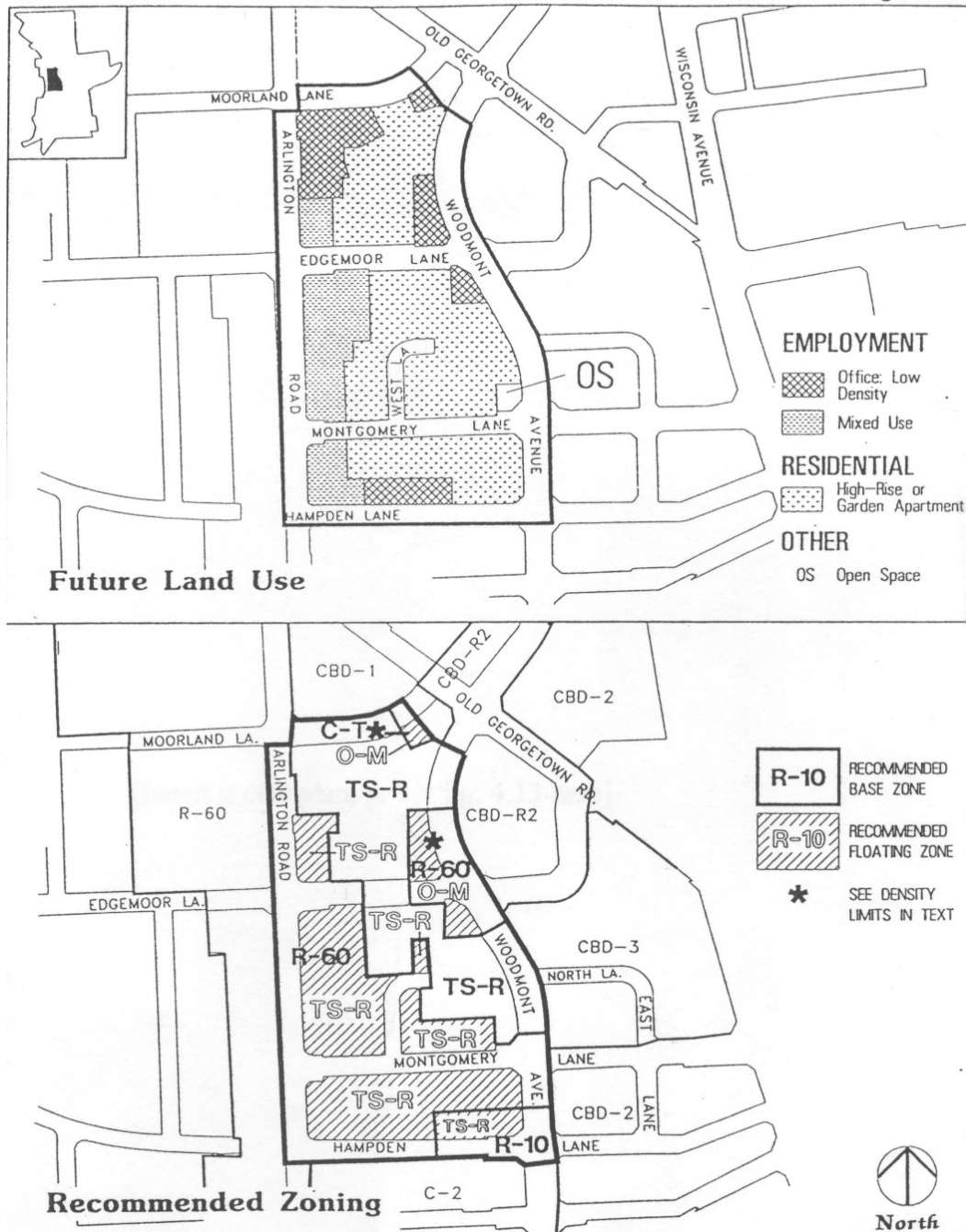
The 1954 Regional District Zoning applied the R-60 Zone to the site. The 1958 County-wide Comprehensive Zoning reaffirmed the R-60 Zone. The 1976 Bethesda CBD Sector Plan recommendations were applied by Sectional Map Amendment in 1977 and this action reconfirmed the R-60 Zone for the site. The 1994 comprehensive amendments to the Bethesda CBD Sector Plan were applied by Sectional Map Amendment in 1994, again reconfirming the R-60 Zone. The Technical Staff reported that special exceptions for private educational institutions applied to the site since 1995.

The 1994 Sector Plan recommends the site for the TS-R Zone. The planning objectives for the area support higher density residential uses near both Metro and retail services. A minimum density of 45 dwelling units per acre is generally recommended for the TS-R district except for lots facing Arlington Road, where lower densities are recommended to allow for townhouses. The planning recommendations are depicted on the next page.

The proposed development is generally consistent with the recommendations of the sector plan. The plan contains planning and design objectives. Within the context of existing and approved development, the proposed development will add a variety of housing to the BTSRD including much

needed affordable housing. Moreover, the proposal includes step down in building heights and provides for a transition from the high-density urban core to the lower density areas outside the immediate Metro area.

**Sector Plan Figure 4.13, Transit Station Residential District**



### **C. SURROUNDING AREA**

The TS-R Zone is a floating zone<sup>1</sup>. In a floating zone case the surrounding area must be identified so that compatibility and other issues can be properly evaluated. The “surrounding area” is defined less rigidly in connection with a floating zone application than the zoning neighborhood is in a Euclidean zone case.

In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development. In the present case, the Applicant’s architect recommended a surrounding area including those uses within a 1,000-foot radius of site. The Technical Staff defines the area more precisely to include only those properties within BTSRD and properties or roads immediately adjacent to the district. The staff area is more consistent with surrounding areas used in other TS-R Zoning cases in this area. The Applicant’s land use consultant seems to have adopted the staff’s recommendation and it will be applied to the evaluation of this application. The staff’s surrounding area is depicted on the next page.

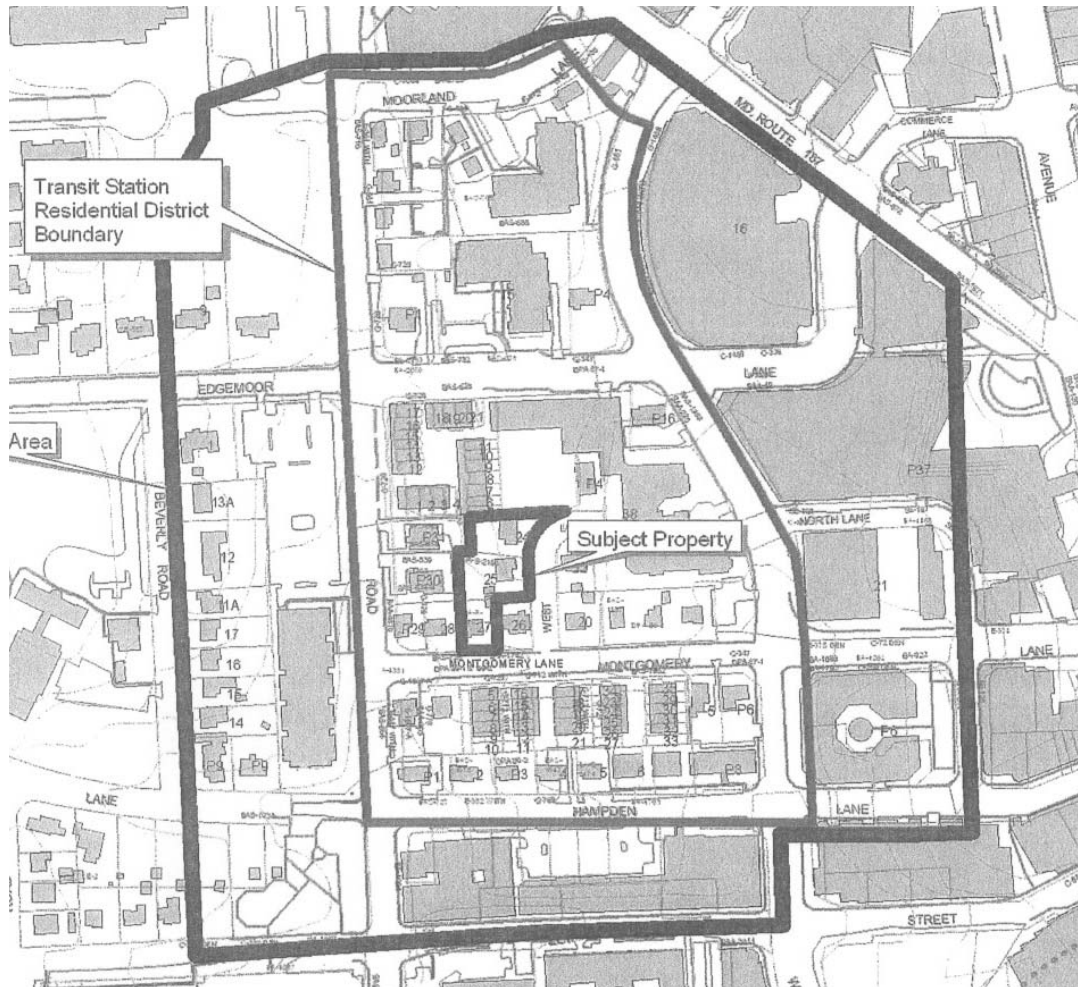
### **D. LAND USE AND ZONING PATTERN**

The land use and zoning pattern of the area reflects a predominately residential character, although high rise office uses are located in the eastern portion of the area and retail services are located at the southern edge of the area. The BTSRD is composed of a number of multifamily and townhouse projects approved under the TS-R Zone after the adoption of the 1994 Sector Plan. Most of these projects have been developed. The remainder of the district is composed of older garden apartments and single-family structures either retained for residential use or converted to commercial uses by special exceptions.

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<sup>1</sup> A floating zone derives its name from its primary characteristic, that is, it floats over the entire county and is not generally applied to the zoning map during comprehensive zoning. It is applied to the zoning map at the request of the property owner by LMA. The floating zone is designed to provide property owners with a rezoning method that can be applied quickly in response to changing market conditions. The floating zone was first authorized in Maryland in *Huff v. Board of Zoning Appeals of Baltimore Co.*, 214 Md. 48, 133 A. 2d 83 (1957).





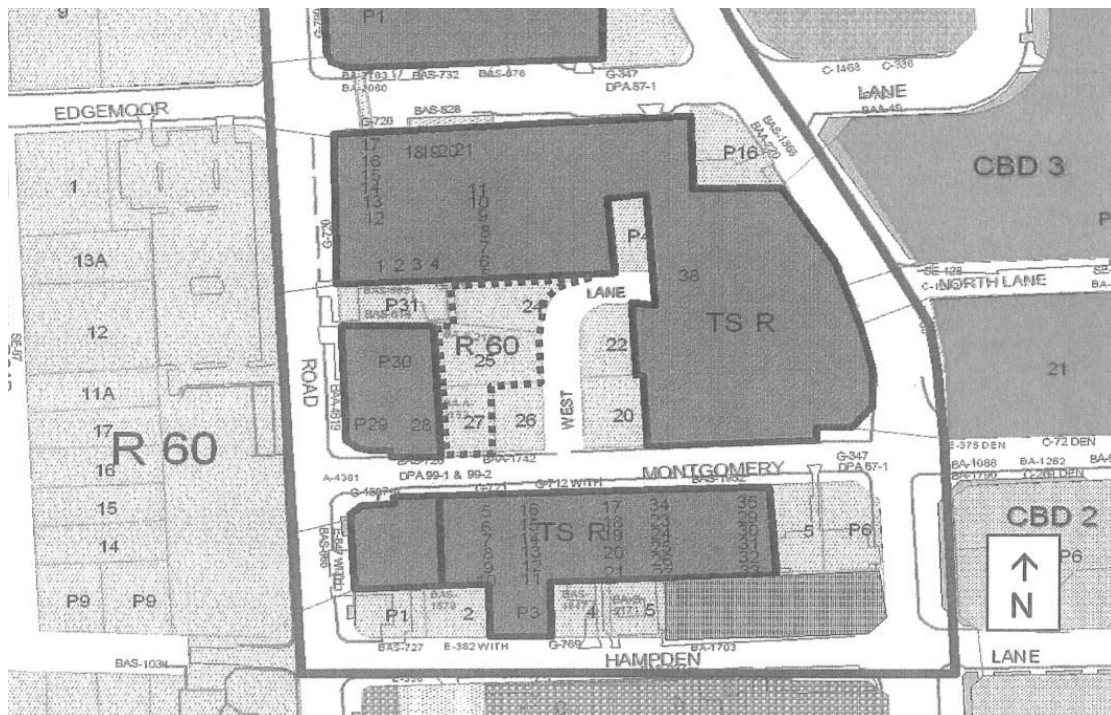
Located northwest of the site are 22 townhouses built to a three-story height with below grade parking. This project was developed under the TSR Zone as the Villages of Bethesda, approved under LMA G-720 on October 10, 1995. The Chase high rise is located east of the site along Woodmont Avenue and is developed under the TS-R Zone in two buildings, 90 and 120 feet in height, with a density of 340 dwelling units. Located further north along Woodmont Avenue is another TS-R Zoning project known as the Christopher, which is developed to a height of 122 feet with 200 dwelling units.

Located to the south along Woodmont Avenue is a 100-foot tall multifamily building known as the Edgemoor high rise. Located southeast of the site is an existing residential building at the corner of West and Montgomery Lanes used as a law office (Wolf lot 26). Across West Lane from the site are two single-family buildings and one is still in residential use (Chipouras Lot 22).

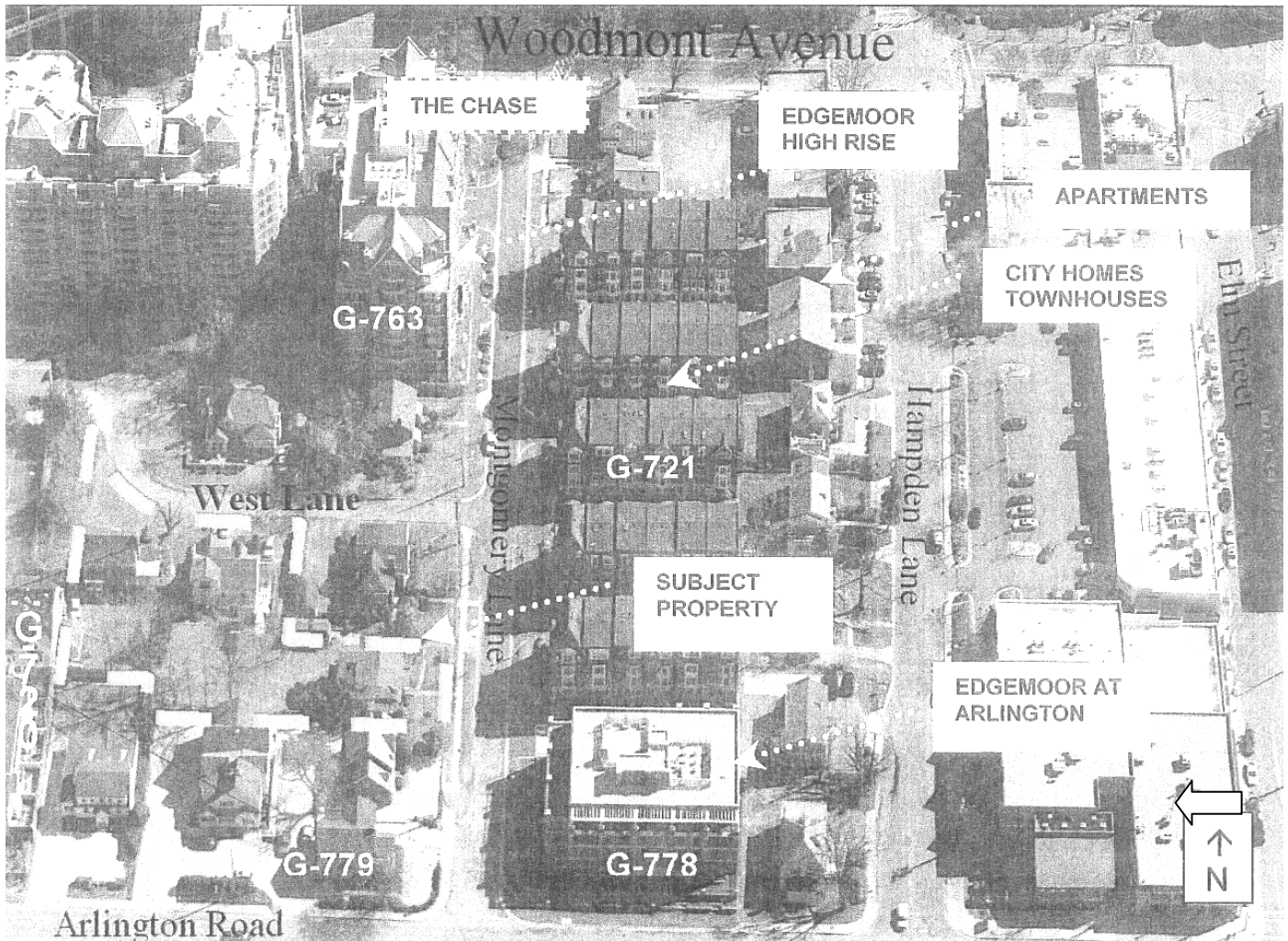
South of the site is the 29-unit City Homes townhouse project, approved for the TS-R Zone under LMA G-721. This project was approved on February 1, 2000 and is developed with 5 rows of townhouses perpendicular to Montgomery Lane with a 55-foot height and three stories. Also on the south side of Montgomery Lane and the east side of Arlington Road is the Edgemoor at Arlington, another project approved under the TSR Zone with a 46 foot building height and underground parking.

The western edge of the site is bordered by three single-family structures currently used for commercial uses and located at the corner of Arlington Road and Montgomery Lane. However, this area was approved for the TS-R Zone on February 27, 2001 under LMA G-779. The future development was approved for 12 dwelling units, 9,100 square feet of office uses and 38 underground parking spaces. The approved building height is 33 feet along Arlington Road and 47 feet at the eastern edge where it abuts the subject property. Access to garage parking will be by way of Montgomery Lane adjacent to the subject property. The zoning and land use patterns of the area are depicted below and on the next page.

**Subject Property and Surrounding Zoning, Staff Report Figure 2**



### Aerial View of Subject Property and Adjacent Properties, Staff Report Figure 3



## E. PROPOSED DEVELOPMENT

The Applicant proposes a number of features to the development plan that require separate evaluation.

### 1. Land use and density

The Applicant proposes to build a multifamily residential building that will provide up to 50 market rate dwelling units and up to 7 Moderately Priced Dwelling Units (MPDUs). The MPDUs are intended to provide housing to those families below the median income. The total density is proposed at 71,000 square feet or 74 dwelling units per acre.

The Applicant is proposing the maximum density so as to fix the contours of the building so compatibility and other factors can be evaluated. The Applicant proposes flexibility to reduce the number of dwelling units if future market conditions call for larger but fewer units. The overall building envelope will generally remain the same. The only problem with this approach is that without a specified minimum density, it is difficult to assess compliance with the density recommended in the Sector Plan, which is expressed as a range, from 45 to 100 dwelling units per acre.

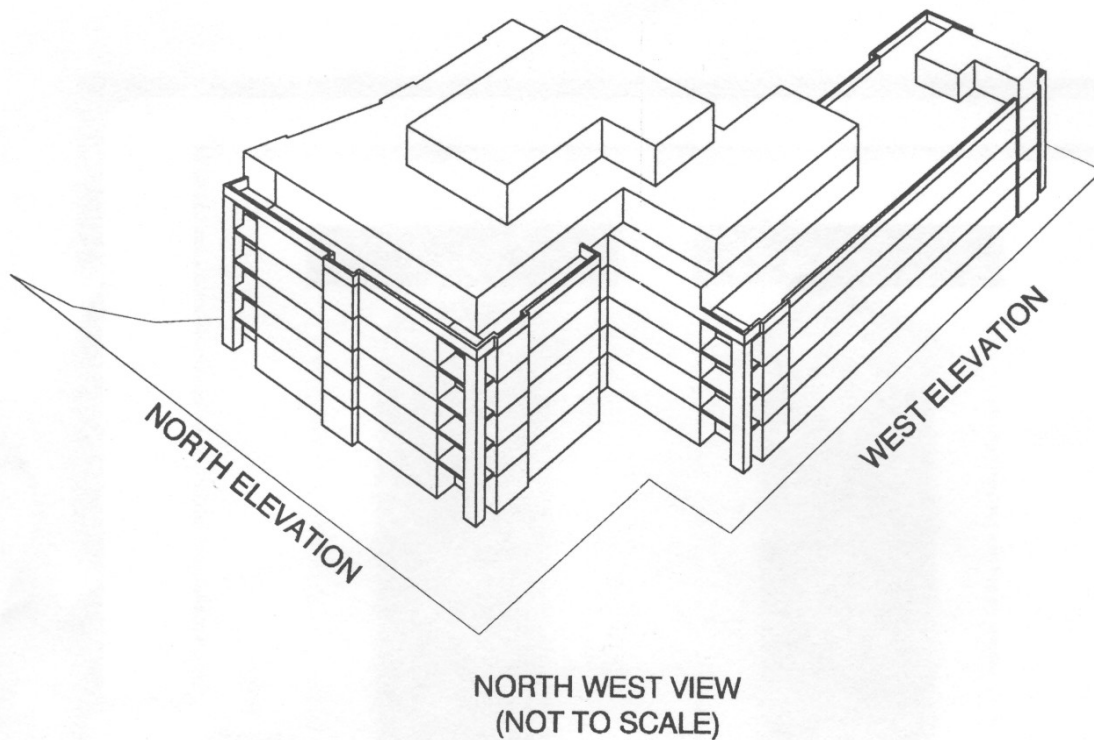
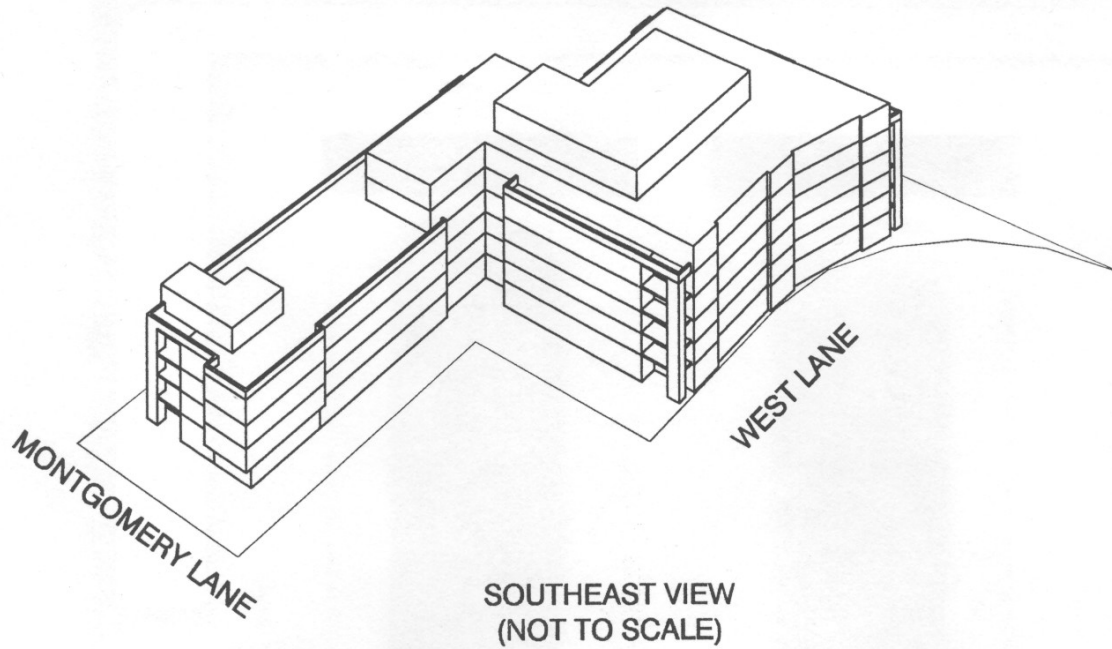
## **2. Building Heights, Mass and Setbacks**

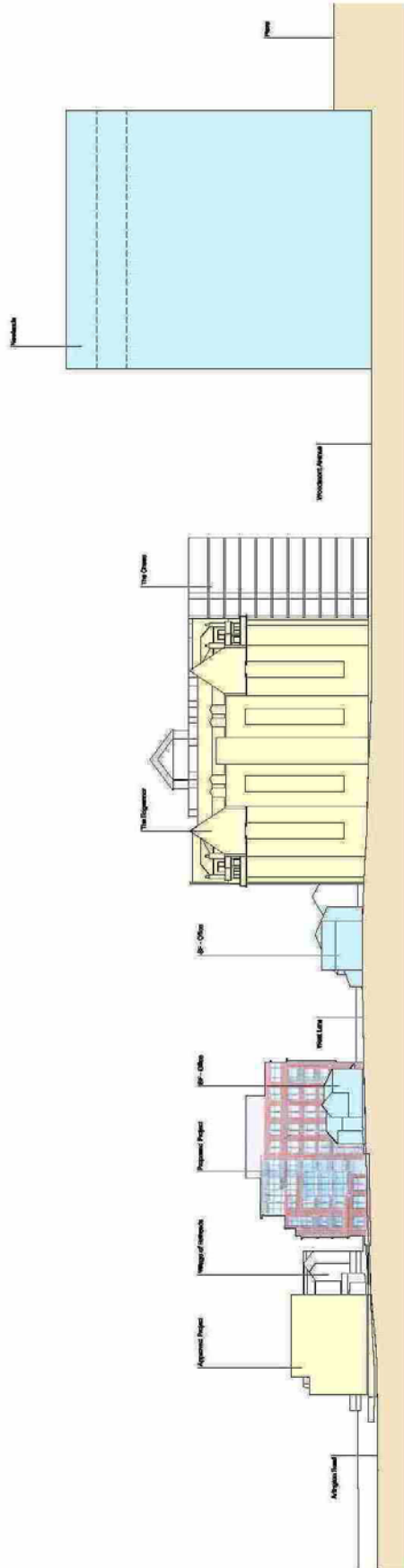
The proposed building will be composed of 4-story and 6-story wings, with a maximum height of 65 feet. The 4-story wing will contain a pop up penthouse with a private terrace. The 6-story wing will contain a penthouse for mechanical equipment. The 4-story wing will extend along the southern and western portions of the site. The 6-story wing will extend along the northern end of the site. An architect's perspective to the two wings is illustrated on the following page.

The site configuration is long and narrow and limits the scope of building design. The southern end of the site is only 40 feet wide and is bordered by Montgomery Lane. The building mass projects the 4-story height to Montgomery Lane and will be made up of townhouses. The proposed building height on this part of the site is consistent with development across the street, which reflects townhouses and low-rise structures. The relationship of building height to nearby development is shown on page 14.

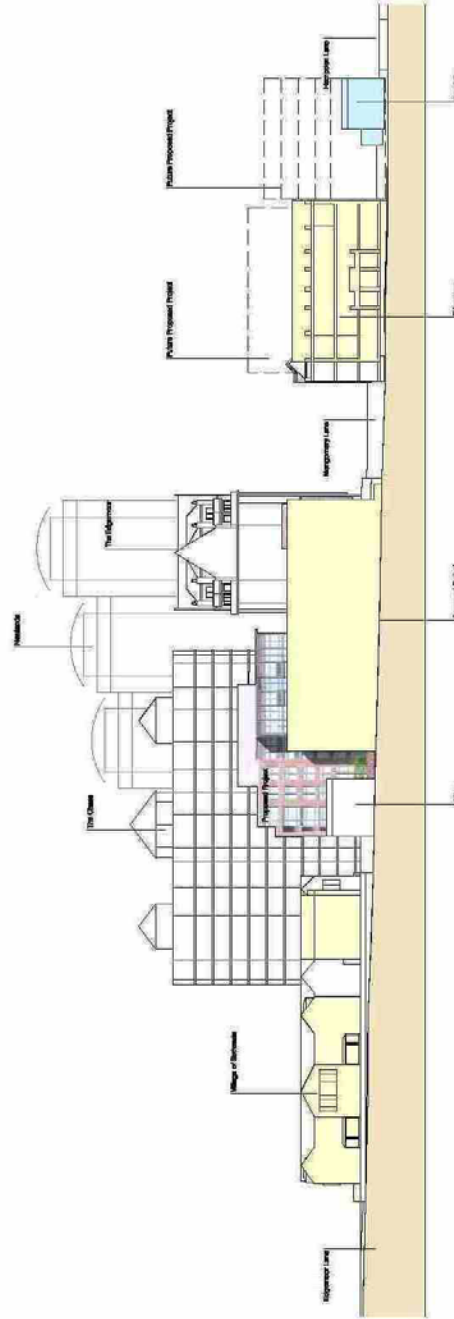
The building height along the northern portion of the site will be 65 feet. The sector plan recommends that a 65-foot height is appropriate for this area of Bethesda, with step down in building heights toward the Arlington Road corridor. Located further east of the site is Woodmont Avenue and taller buildings at the Edgemoor and Chase high rises.

# MASSING DIAGRAM





Montgomery Lane - Context Elevation



Arlington Road - Context Elevation

**BETHESDA WEST LANE**

**MONTGOMERY CO. - BETHESDA, MD**

**PRELIMINARY CONCEPT PLANS**  
For Illustrative Purposes Only  
Not Intended to Represent Final Building Design

**THE HOLLADAY CORPORATION**

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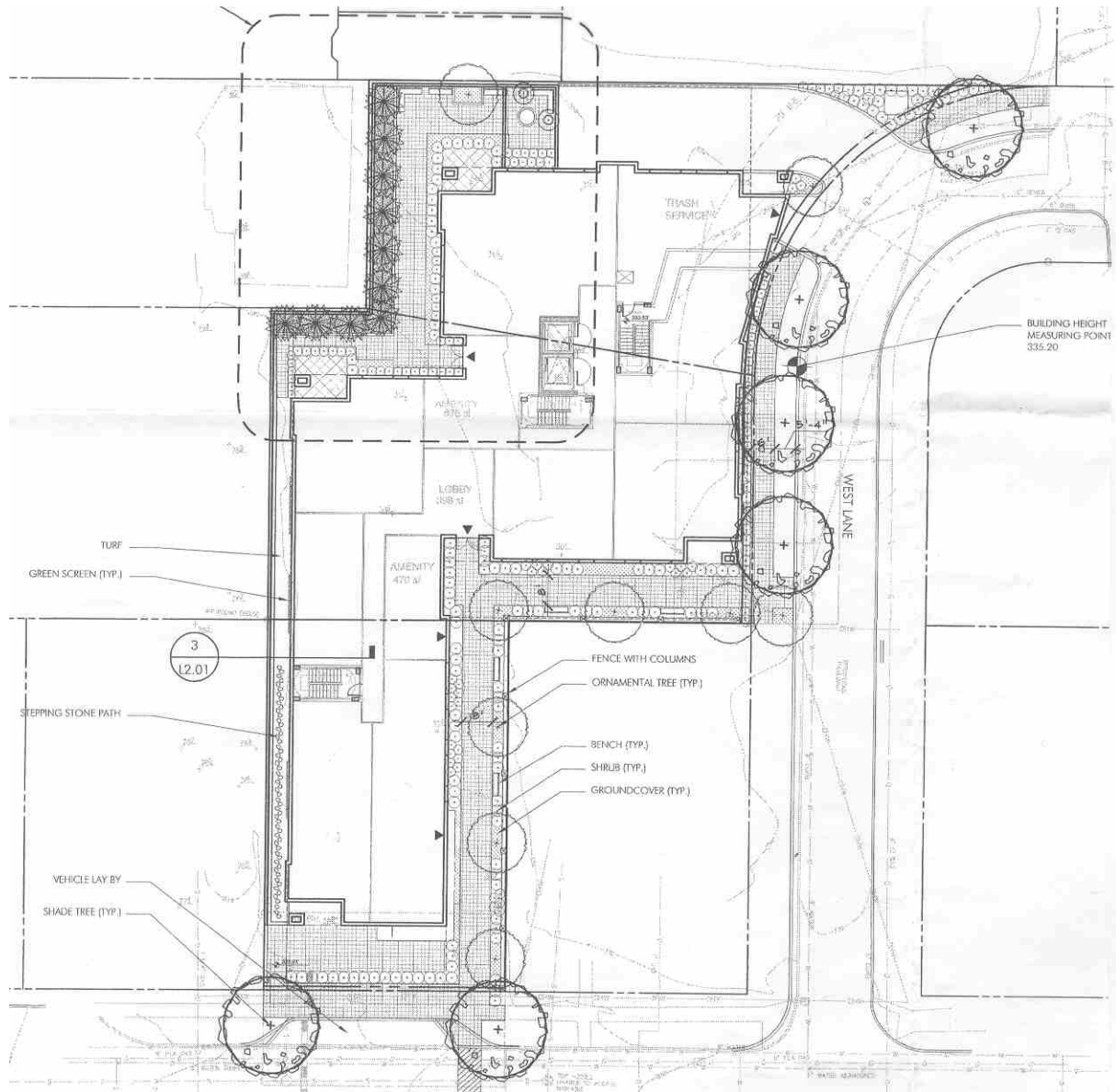
The Opposition contends that the building mass and height as it relates to neighbors to the north is not compatible. The Opposition expressed concern that the mass and height of the building is located too close to the Villages of Bethesda. They argue that taller structures will cut off the sun from the enjoyment of existing residents of the Villages of Bethesda. Other recent projects in the Arlington Road corridor reflect low scale development. For example, the City Homes project on the south side of Montgomery Lane has a 50-foot height and the Edgemoor will be developed at 46 feet. While the proposed development is not located right on Arlington Road, it is close enough and adjacent to low scale development. The proposed building heights should be more sensitive to adjacent properties.

The Applicant will provide setbacks in order to alleviate the impact of mass and height. There will be a 15-foot setback from Montgomery Lane to the face of the building. Testimony indicated that there will be a minimum 20-foot setback along the northern building line to the Villages of Bethesda property, although this setback is not specified on the development plan. There will be a 6-foot setback from the western facade of the building to the property line.

Setbacks and other amenities attempt to alleviate any compatibility problems with the neighbors. Nevertheless, the Opposition has raised some valid concerns about the building mass and height that should be re-examined. The building heights of existing or proposed buildings to the west are more sensitive to this issue. A higher level of compatibility can be achieved here and the Applicant needs to work on this issue.

The setbacks, plantings, terraces and pedestrian mews are illustrated on the next page.





### 3. Dedications

The Applicant will provide all necessary easements and dedications required for this project, although it is not clear that these dedications will be sufficient to support adequate road construction. The sector plan indicates that Montgomery Lane needs to have a right of way of 52 feet or 26 feet from the centerline of the road. The Applicant will provide a dedication of additional right of way to insure the 26 feet right of way on the adjacent portion of Montgomery Lane.



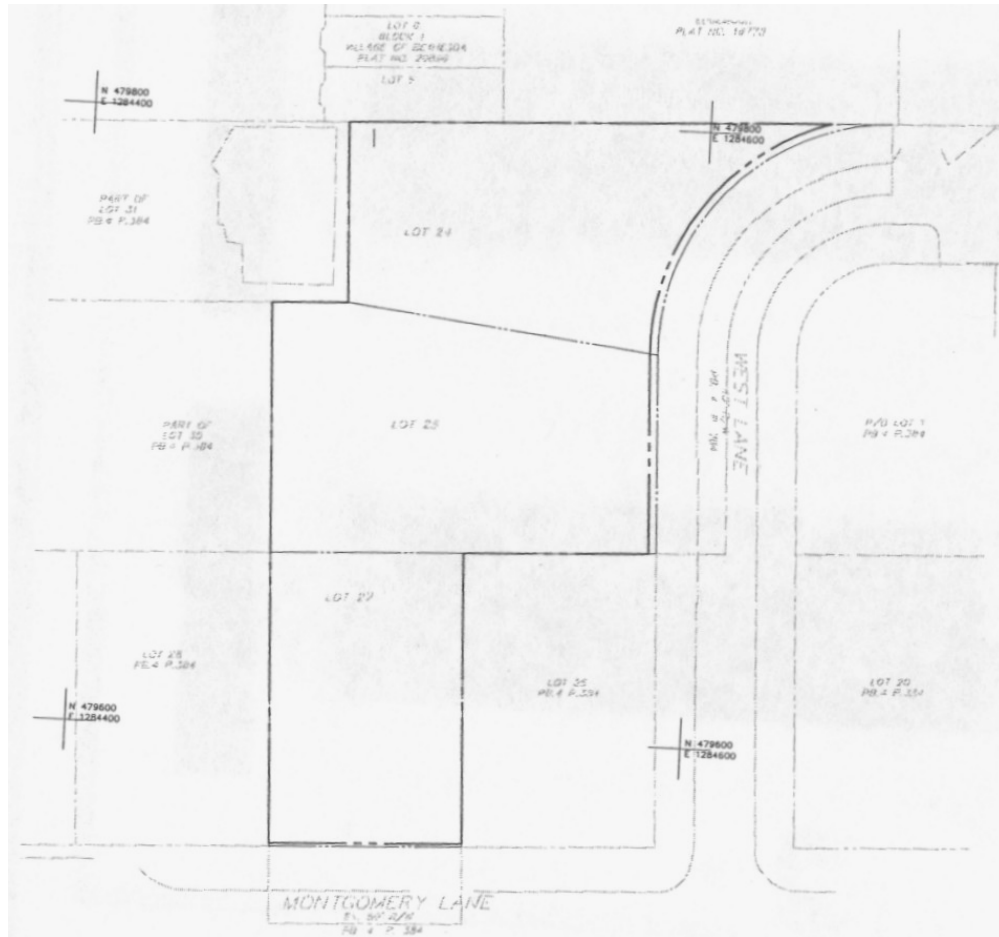
The sector plan does not specify the desired width of West Lane. Instead, the Technical Staff's Transportation Division recommended that the street have a 50-foot right of way. Its current right of way is 45 feet. The Applicant will dedicate 2 ½ feet so the street will reflect a 25 right of way from the centerline. The right of way on the other side of the street will be addressed if and when adjacent land is redeveloped.

It is intended that West Lane will ultimately have a full paved width of 22 feet. What is unclear in the record is whether the Applicant will provide a full paved width or whether the full paved width must wait for the redevelopment of properties on the east side of West Lane.

#### **4. Access**

West Lane will serve as the sole point of vehicular access. A two level below grade parking garage will be located off West Lane at the northern edge of the site and will provide 78 underground parking spaces. West Lane is a dead end street as it extends along the eastern perimeter of the site. The current paved width of West Lane is variable and reflects an 18 to 19 foot width. Montgomery Lane is a two way street up to West Lane and is one-way westbound beyond this point. The configuration of West Lane is depicted on the next page.

According to the Applicant's traffic expert, West Lane currently reflects about 10 peak hour trips during the a.m. (6:30 to 9:30 a.m.) and p.m. (4 to 7 p.m.). The Applicant's evidence suggests that there are no problems with existing traffic along West Lane. The Applicant contends that there will be adequate access to the building by way of a 22-foot wide driveway from West Lane into a garage entrance in the rear of the building. The Applicant's evidence concluded that the vehicular circulation will be safe, adequate and efficient because there is a low traffic level along this road.



Increased pedestrian traffic will occur as a result of the proposed development and its pedestrian mews. The Applicant's testimony concluded that the driveway off West Lane will be much safer for pedestrians and vehicles than direct access to the site from Montgomery Lane.

Several adjacent property owners questioned why access is not to and from Montgomery Lane, as is the case with other existing and approved development along this street. They questioned the single point of access from West Lane because the street lacks substantial width, is not a through street and has a configuration that makes turning movements difficult for emergency vehicles.

The Applicant responded that its Montgomery Lane frontage is narrow and a garage driveway at this location would consume one-third of the frontage and destroy the continuity of the planned streetscape. Trash trucks and service vehicles can better serve the site from West Lane. The Technical Staff concluded that vehicular access from Montgomery Lane was a bad idea because the parcel to the west is approved for TS-R development under LMA Application G-779 and will provide a 20-foot wide garage entrance from Montgomery Lane next to the proposed development. According to the Applicant's evidence, two vehicular access points so close together would seriously cut into streetscape and cause traffic congestion.

The adjacent neighbors characterized West Lane as nothing more than an "alley". The Applicant did not submit a traffic study or analysis that shows how traffic movements to and from West Lane will merge with Montgomery Lane or how trucks and cars will be able to simultaneously navigate this narrow street. It appears that the existing traffic has 10 peak hour trips and the proposed development will produce another 15 peak hour trips for a total of 25 peak hour trips. The Applicant contends that 20 feet of paved width will be provided "...following redevelopment of the Project"...Ex. 81, p. 4. It is not clear how this paved width will be provided since the right of way has not been dedicated on the other side of the street. Moreover, the Applicant's Binding Element No. 17 only provides for the paving of 11 feet of proposed width. Without an adequate access point, the LMA is premature. The present state of the record leaves considerable doubt about the adequacy of West Lane as the sole access point in its current condition. The footprint of the proposed building and other buildings with frontage on West Lane are depicted on the next page.

## 5. Parking

The zoning ordinance requires 60 parking spaces to serve the proposed density of 50 dwelling units plus MPDUs. The proposed development is expected to include 78 parking spaces in the parking garage, exceeding the minimum parking requirements and provide 1.3 parking spaces per unit, although the number of parking spaces is illustrative at this stage. The parking garage will be located under the proposed building's northern terrace.

## 6. Amenities

The project contains a number of amenities. The building will use masonry materials that are characteristic of buildings in the area. Public use space will amount to 2,364 square feet or 10% of the site.

Active and passive recreational space is proposed to occupy 4,875 square feet or 21 % of the site, although a textual binding element specifies a minimum of 20 percent, as required under the zone.

Enhanced streetscape will be located along Montgomery Lane and West Lane. The streetscape along West Lane will have a 14-foot wide area with 5-foot sidewalks, street trees, and brick pavers. The wide sidewalk is intended to invite pedestrians to use the area. This pedestrian mews will connect with Montgomery Lane and the western entry point of the building. The building will also contain detailing for masonry and windows. Other features that were described in testimony but are not specified on the development plan include a townhouse type façade at the southern end of the building, to be compatible with development along Montgomery Lane, and on the east side of the building, include brick columns with low freestanding combinations of retaining walls and intermittent fences, some of which may be wrought iron. Montgomery Lane is the more prominent street and its sidewalk area is proposed to range from 7 to 10 feet. The streetscape at this location will also contain a strip of trees.

Testimony suggested that there will be common outdoor and public spaces, roof top terraces and interior community space, and a rear garden at the north end and at West Lane. Per the testimony, the northwestern corner of the site will contain an outside terrace that will be about 3 feet below the terrace for the neighboring Villages of Bethesda townhouse complex. Testimony also indicated that the top floors of the northern portion of the building will be set back so as to vary the building mass for the Villages of Bethesda residents.

Streetscape in the western part of the project will include a 6-foot buffer area along the western property line to a private terrace in the rear of the site. A landscape screen of at least ten evergreen trees, at least 8 to 10 feet tall at planting, will provide a year round buffer. The western façade will include green screens, which are structures attached to the building that can host a climbing vine. The proposed building from all sides and open space areas are depicted on the next two pages.



North



West



Montgomery Lane



West Lane

BETHESDA WEST LANE

MONTGOMERY CO. - BETHESDA, MD

Scale: 1/8" = 1'-0"

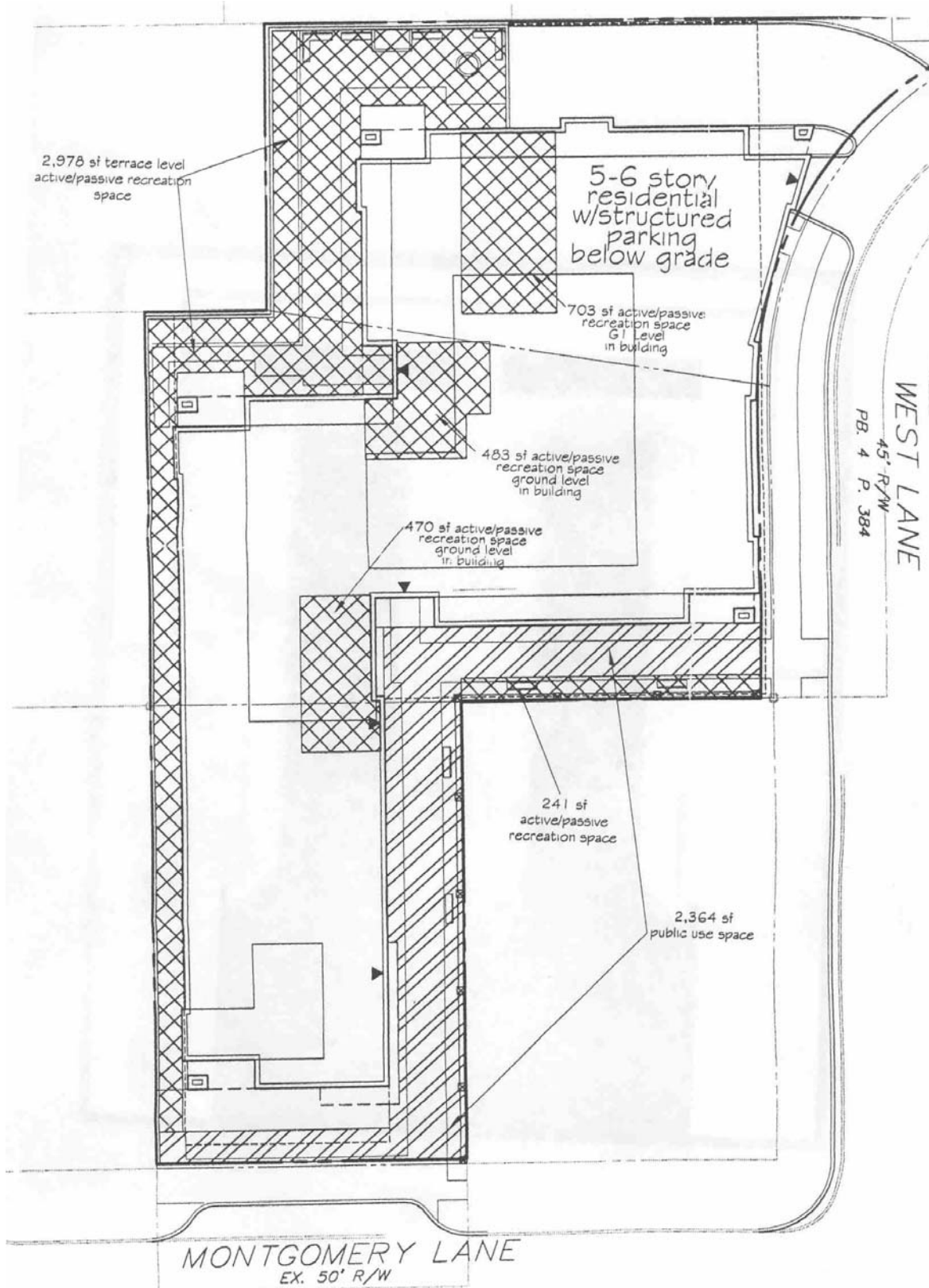
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EXHIBIT NO. 77 (m)  
APPLICATION NO. G-843



## **7. Green Building**

The textual binding elements stated that green building elements will be part of the basis for final design at site plan, although the details are not specified. The Applicant filed a last minute proposal to submit the green component for LEEN Certification as a green building.

This new evidence was submitted in highly irregular fashion during the Applicant's rebuttal the day that the record closed. The rebuttal case is normally confined to the Applicant's response to Opposition evidence. The timing of the submission foreclosed any comment on the new evidence from the Opposition or the People's Counsel. In addition, the Applicant neglected to submit any information about LEEN, what it is and the significance of its certification. The only fair way for this information to be considered is for the matter to be remanded for further proceedings.

## **8. Shadow Study**

The Applicant conducted a shadow study of the impact of taller buildings on the adjoining Villages of Bethesda townhouse community. The first study was conducted in late 2005 and another was conducted during the summer of 2006. The study shows that taller buildings located along Woodmont Avenue create early morning deep shadows for about 75% of the Villages of Bethesda community. These existing buildings cause most of the shadow problems. The proposed development will not likely create substantial shadows. In fact, the set back of the 6-story portion of the proposed building helps the shadow impact on the neighboring properties.

## **9. Perpetual Maintenance of Recreational, Common and Quasi-public areas**

The Applicant submitted specimen condominium documents, Ex.77 (b), (c) and (d). These documents provide for a condominium organization to assume responsibility for the perpetual maintenance of all recreational, common and quasi-public areas.

## **10. Binding Elements of the Development Plan**

The flexibility accorded developers in TS-R Zoning cases sometimes requires a developer to specify textual binding elements that insure a specific form of development will be provided that will not be altered



during post zoning review. The textual binding elements become an integral part of the development plan that is specifically approved by the District Council and this document sets the context for all post zoning review. A development plan is considered binding except where specific elements are described as illustrative. The District Council is the only entity that can make alterations to the binding elements of an approved development plan and these alterations would occur during the review of a development plan amendment. In this case the Applicant offers 19 textual binding elements

1. The building will have a maximum height of 65 feet, as measured from the building height measure point along the West Lane top of curb, whose elevation is 335.2, and as shown on the development plan.
2. The development will have a maximum density of 2.5 FAR [floor area ratio].
3. The development plan will have a maximum of 50 units.
4. The development will provide 12.5 percent of the units ultimately permitted for construction as MPDUs.
5. The development will provide a minimum of 10 percent public use space.
6. The development will provide a minimum of 20 percent active/passive recreational space.
7. The development will provide an evergreen landscape screen of not less than ten (10) evergreen trees of not less than 8 to 10 feet tall at the time of planting to be planted along the northwestern property line to serve as a landscape buffer.
8. Any exposed terrace or retaining wall along the western property line will be improved with similar materials as façade of the building.
9. The development will be set back from the northern property line a minimum of 20 feet exclusive of bay windows and other building projections.
10. The western façade of the development will be located six feet from the western property line, exclusive of bay windows and other building projections.
11. The western façade of the development will include a minimum of 20 percent windows.
12. The western façade of the development will include green screens.
13. The garage door to the below grade parking will be provided underneath and within the building.
14. The Applicant will enter into a construction agreement with the Villages of Bethesda prior to the commencement of construction which shall include, but not be limited to underpinning provisions, crane swing provisions and an agreement to conduct pre and post construction evaluations of the garage and foundation of the Villages of Bethesda.
15. Any fence needed along the western property line as a result of the grade differential will be an open rail design.
16. Additional façade detailing will be provided along the western façade.
17. Applicant will dedicate 2 ½ feet along the West Lane frontage of the property and subject to DPWT, DPS and M-NCPPC requirements will provide as follows: 11' paving from center line to face of curb; 5' planting strip from face of curb to sidewalk; 5' sidewalk; and 4' building setback from the property line.
18. Declarant and/or its successors will maintain on-site landscaping.
19. The following features will form the basis for the final design to be determined at site plan:
  - The number of stories and general massing, excluding balconies and bay window projections, will be as provided on elevations and 3-D drawings set forth on development plan.

- Predominately masonry façade, excluding accenting details, which may include, but not be limited to brick, stone, or manufactured stone, precast or ceramic tiles.
- Landscaping to include street trees along West Lane and Montgomery Lane in conformance with Bethesda Streetscape Plan, landscaping along mews, and ground cover along the western property line.
- Windows on all facades
- Flat roofs
- Vehicular access to be located in northeast corner of property off of West Lane.
- On-site parking located below grade.
- Provision of green building elements such as partial sedum (green) roof, energy star appliances, and green interior finishes package option and recycled building materials.
- Final location and configuration of 5<sup>th</sup> floor roof top access penthouse to be determined at site plan. [Development Plan, Ex. 77 (p), Binding Elements]

## **F. PUBLIC FACILITIES**

Under the County's Adequate Public Facilities Ordinance ("APFO"), the Planning Board has the responsibility to assess whether public facilities will be adequate to support a proposed development when it reviews a preliminary plan of subdivision. While the ultimate test under the APFO is carried out at subdivision review, evidence concerning adequacy of public facilities is relevant to the District Council's determination in a rezoning case as to whether the reclassification would serve the public interest. The preponderance of evidence supports a factual conclusion that the proposed development of the site, with the exception of the site access problems discussed earlier in this report, will not cause an adverse impact on public facilities or services.

### **1. TRANSPORTATION AND RIGHT OF WAY DEDICATION**

With the exception of West Lane, the Applicant submitted evidence to show that the proposed development would not likely generate an adverse impact on transportation services or facilities. The proximity of Metro to the site and the proposed pedestrian systems are positive factors in this adequate public facilities review. A local area transportation review was not necessary because the project will produce less than 30 peak hour trips.

The trip generation rates for the proposed 50 units of development would be 0.3 vehicles per unit. The a.m. and p.m. peak hours of traffic would be 15 vehicles. However, this traffic may be a problem along the

narrow contours of West Lane and the merger of the traffic to and from Montgomery Lane. More information is needed to make a proper evaluation.

## **2. UTILITIES, STORM WATER, AND SEDIMENT CONTROL**

Water and sewer facilities are in close proximity to the site. The MNCPPC Environmental Planning Division exempted the site from forest conservation requirements because of its small size. The storm water plan deals only with water quality issues because the low volume of flow from the site will not require water quantity control. The water quality control will be provided on site at two locations. The green roof will include a layer of soil with plant material on top that will filter water. Also, a water quality control structure will be located underground and water will be filtered before it is released into the public drainage system.

Sediment control will be handled on site. Silt fences will be located along property lines to insure that adjacent properties are not adversely impacted. The runoff will not leave the site and will go initially into the garage excavation area and then channeled to a sediment tank. Clear water is then released into the drainage system. The County Department of Permitting Services will issue a permit before construction begins.

The evidence supports a conclusion that adequate measures are proposed to prevent soil erosion and preserve natural features of the site. The proposed development would not overwhelm facilities, adversely impact the surrounding area or conflict with the County's Capital Improvement Program.

## **3. SCHOOLS**

The Applicant and the Technical Staff provided evidence that schools will be adequate for the proposed development. Based on current Annual Growth Policies the capacity of relevant schools will be adequate to accommodate the proposed development. According to Technical Staff, the proposed development is expected to generate less than normal numbers of school-aged children.

## **IV. SUMMARY OF TESTIMONY**

The summary of testimony consists of the Applicants Case in Chief, the Opposition's case in chief, a summary of the Peoples' Counsel's participation, and the Applicant's rebuttal. All testimony was submitted under oath.

### **A. APPLICANT'S CASE IN CHIEF**

The Applicant submitted the testimony of 6 witnesses, five of whom were qualified as experts and they rendered opinions within their fields of expertise.

Rita Bamberger is Senior Vice President of the Holladay Company, a 53-year-old family owned real estate firm that specializes in developing infill projects. The company has built residential, retail, office and assisted living projects throughout the metropolitan Washington, D. C. area for the past 15 years.

Ms. Bamberger explained that the Applicant, Holladay West Lane, LLC, is a single purpose entity that was created by the Holladay Corporation for the development of the site. She indicated that the applicant's objective is to develop the recently acquired site with a multifamily residential building that complies with the density and height objectives of the approved sector plan. She considers the site to be well suited for a residential building given the diverse mix of housing in the neighborhood. The Applicant has geared the project to insure conformity with the planning and zoning objectives for this area.

Ms. Bamberger was involved in outreach efforts with nearby property owners and homeowner organizations. She met with the boards of directors for the Edgemoor Civic Association and the Villages of Bethesda. She also met with individual adjacent and confronting property owners. Several of these owners initially opposed the project, but with revisions to the development plan they now support the project.

William Landfair is a land planner and project manger with VIKa, the applicant's land use consultant. Mr. Landfair possesses a master's degree in planning and is a member of the American Planning Association and American Institute of Certified Planners. He has 20 years experience as a land planner. He qualified as an expert witness in the field of land planning.

Mr. Landfair described the subject property as containing a total size of 28,537 square feet, made up of three lots currently classified under the R-60 zone and improved with single family residential structures now used for commercial purposes. Lot 24 is located on the west side of West Lane. Lot 25 is located on the west side of West Lane. Lot 27 is located two lots west of the northern corner of the intersection of Montgomery Lane and Arlington Road. The topography of the site reflects a grade increase from the southwest corner to the

northeast corner. The entire site is located in the Sector Plan's Transit Station Residential District. The site is located 1,000 feet from the Bethesda Metro Station with direct access to Metro.

Mr. Landfair described the surrounding area as including the Sector Plan's Transit Station Residential District. This area is composed of multifamily uses and townhouses developed after the adoption of the sector plan. It also includes older garden apartments and single-family structures converted to commercial uses by special exceptions. Located northwest of the site are 22 townhouses built to a three-story height with below grade parking. This project was developed under the TSR Zone as the Villages of Bethesda. The Chase high rise is located east of the site along Woodmont Avenue. Located to the south of the Chase along Woodmont Avenue is another high-rise known as the Edgemoor. Located southeast of the site is an existing residential building at the corner of West and Montgomery Lanes. Across West Lane from the site are three single-family buildings and one is still in residential use.

Mr. Landfair continued to describe the surrounding area. South of the site is a 29-unit townhouse project known as City Homes. This project is developed with 5 rows of townhouses perpendicular to Montgomery Lane with a 55-foot height or 3-story configuration. Also on the south side of Montgomery Lane is another project approved under the TSR Zone for 11 dwelling units with a 46 foot building height and underground parking. The western edge of the site is bordered by three single-family structures currently used for commercial uses and located at the corner of Arlington Road and Montgomery Lane. However, this area is approved for development under the TSR Zone for 12 dwelling units, 9,100 square feet of office uses and 38 underground parking spaces.

Mr. Landfair described the proposed development as a multifamily residential building that will provide up to 50 dwelling units and up to 7 MPDUs. The MPDUs are intended to provide housing to those families below the median income. The building height will vary between 4 stories or 40 feet along the southwest boundary to 65 feet along the northern portion of the site. The four-story component will be made up of townhouses. The project will provide 78 underground parking spaces

Mr. Landfair indicated that the total density is proposed at 71,000 square feet or 74 dwelling units per acre. The project contains a number of amenities. Public use space will amount to 2,364 square feet or 10% of

the site. Active and passive recreational space will amount to 4,875 square feet or 21 % of the site. Enhanced streetscape will be located along Montgomery Lane and West Lane. This area will have sidewalks, street trees, brick pavers, and Washington Globe Lights. A garden mews will follow the edge of the property to West Lane. There will be common outdoor and public spaces, roof top terraces and interior community space. A rear garden will be located at the north end and at West Lane.

Mr. Landfair testified that in order to facilitate the amenities, the Applicant will provide generous setbacks. There will be a 15-foot setback from Montgomery Lane to the face of the building. There will be a 20-foot setback along the northern building line to the Villages of Bethesda property. There will be a 6-foot setback from the western facade of the building to the property line. The Applicant will dedicate a right of way along West Lane to allow for 25 feet from the centerline of the road. There will be 11 feet of pavement for West Lane and 14 feet between the road and the face of the building to allow for trees, sidewalks and streetscape. Mr. Landfair stated that the Applicant will also provide for dedication of a right of way along Montgomery Lane to a width of 50 feet.<sup>2</sup>

Mr. Landfair was questioned extensively about the absence of specifics about the proposal. The building is proposed to have a green component but none of the green components are binding elements. The Applicant intends that the determination of green components will be made at site plan. Another point of dispute involves the single point of vehicular access by way of West Lane.

Mr. Landfair responded to concerns of several adjacent property owners as to why there is not access from Montgomery Lane as is the case with the Edgemoor high rise. They questioned the single point of access from West Lane. Mr. Landfair pointed out that the Applicant's Montgomery Lane frontage is narrow and a garage driveway would consume one-third of the frontage and destroy the continuity of the planned streetscape.

Mr. Landfair also indicated that the Edgemoor driveway from Montgomery Lane only consumes about one-fifth to one-sixth of the frontage of that building. He noted that trash trucks and service vehicles can better serve the site from West Lane. He also noted that the Technical Staff concluded that vehicular access from Montgomery Lane was a bad idea because the parcel to the west is approved for redevelopment under the TS-R

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<sup>2</sup> This dedication will need to be shown on the development plan if the project moves forward.

Zone with vehicular access from Montgomery Lane at a point very close to the Applicant's proposed building and two vehicular accesses so close together would seriously cut into streetscape and cause traffic congestion.

Mr. Landfair testified about the recommendations of the 1994 Bethesda Sector Plan and concluded that the proposed development was consistent with the recommendations of the plan. The plan contains planning and design objectives. Within the context of existing and approved development, the proposed development will add to a variety of housing within the Transit Station Residential District including much needed affordable housing. Moreover, the proposal will provide a step down in building heights. It will provide a transition from the high-density urban core to the lower density areas outside the immediate Metro area.

Mr. Landfair concluded that the proposed development would meet the objectives for the Transit Station Residential District. He opined that it will provide a residential scale along the Arlington Road corridor and will exceed the recommended minimum density of 45 dwelling units per acre for this area of Bethesda. The project would provide the recommended floor area ratio and provide for public and private open space.

Mr. Landfair also concluded that the proposed development is consistent with the urban design guidelines. The project will fill out the parcel and provide for a development that will encourage street life and underground parking. In addition, the project will provide for upgraded streetscape and create a more livable street environment. He found that the project meets all the objectives of the sector plan in terms of density, building height, and amenities, although, as noted earlier, it is not clear that it will satisfy the minimum density recommended in the plan. The project is located within 1,000 feet of the Bethesda Metro Station and will provide new residents with convenient access to rail transportation, employment and shopping areas. The project is an appropriate transition between the lower scale Edgemoor community to the west and higher densities located closer to metro.

Mr. Landfair concluded that the project meets all the requirements of the TS-R Zone. With respect to sections 59-C-8.21 and 59-C-8.22, the site is located in a Transit Station Development Area and within 1,000 feet of a metro station, which is within a reasonable walking distance to support the metro system. He stated that the proposed density conforms to TS-R Zone requirements and sector plan recommendations. The proposed location is in conformity with Section 59-C-8.24 as it is a Transit Station Development Area and recommended

for the TS-R Zone by the sector plan. The proposal meets the requirements of Section 59-C-8.25 as it provides for public facilities and amenities. The proposal also meets the land use requirements of Section 59-C-8.3 and the building height specification of Section 59-C-8.51 with respect to size of lot, compatibility and relationship to the surrounding area.

Mr. Landfair also concluded that the development plan meets all the requirements of Section 59-D-1.61 of the zoning ordinance. The project is in substantial compliance with the sector plan and complies with the county housing policy with the provision for more affordable housing and the location of residential uses near Metro. The project is consistent with all the standards and requirements of the TS-R Zone. The proposed development will be compatible with adjacent development and provides ample public amenities.

Mr. Landfair indicated that the proposed development will be located within the Bethesda High School cluster. Based on current Annual Growth Policies, the capacity of the affected schools will be adequate to accommodate the proposed development. He also observed that the proposed development is expected to generate less than normal numbers of school aged children.

Brian Dayhoff qualified as an expert witness in the field of architecture. He helped design the proposed building and described it as a building composed of a 4-story and a 6-story wing. The 4-story wing will contain a pop up penthouse with a private terrace. The 6-story wing will contain a penthouse for mechanical equipment. The building configuration conforms to the site, which is long and narrow. The southern end of the site is only 40 feet wide and is bordered by Montgomery Lane. The building height of development across the street reflects townhouses and low-rise structures. Therefore, the proposed building mass projects the 4-story height to Montgomery Lane.

Mr. Dayhoff described the building and its amenities. The 6-story wing extends along the northern end of the site and the 4-story wing extends along the western portion of the site. West Lane is a dead end street as it extends along the eastern perimeter of the site. West Lane will serve as the point of vehicular access. A below grade garage will be located off West Lane at the northern edge of the site. A pedestrian mews is proposed to run along the eastern edge of the site and connect with Montgomery Lane.



Mr. Dayhoff stated that the western edge of the building will be set back 6 feet from the western property line and a green screen composed of growing vines will be used to soften the building façade, which will also contain detailing for masonry and windows. The northwestern corner of the site will contain an outside terrace that will be about 3 feet below the terrace for the neighboring Villages of Bethesda townhouse complex. There will be about a 20-foot setback from Villages of Bethesda at this location. The top floor of the northern portion of the building will be set back so as to vary the building mass for the Villages of Bethesda residents.

Mr. Dayhoff indicated that the building would use masonry materials that are characteristic of buildings in the area. The sector plan recommended that a 65-foot height is appropriate for this area of Bethesda, with step down in building height toward the Arlington Road corridor. Located to the eastern side of the site are Woodmont Avenue and taller buildings.

Mr. Dayhoff testified that the southern end of the building would contain a townhouse type façade to be compatible with development along Montgomery Lane. The width is only 40 feet at this location and there will not be any driveway access at the southern end of the building. Streetscape will be provided at this location and there will be 2 street trees along Montgomery Lane and 3 street trees along West Lane.

Mr. Dayhoff concluded that the proposed building would be in accordance with the zoning ordinance. The density will comply with the maximum floor area ratio of 2.5. The project includes public use space of 10%, which includes the mews that will connect with Montgomery Lane and the western entry point of the building. Active and passive recreation area will serve the 50 dwelling units plus the MPDUs.

Mr. Dayhoff stated that the Applicant has made changes to the initial development plan to address concerns voiced by neighbors. One change was to increase the area of dedication along West Lane by 2 ½ feet at the recommendation of the MNCPPC because the wider right of way is needed. This increase will allow for a 14-foot area for trees, a sidewalk and plantings along the edge of the building. A second change moved the western edge of the building 6-feet from the property line.

Mr. Dayhoff concluded that the proposed development would be compatible with the surrounding area. The mass and scale of the building is compatibly located between Woodmont Avenue and Arlington Road. The proposed building is compatible with both the high-rise and low-rise buildings at each end of the spectrum.

Mr. Dayhoff conducted a shadow study of the impact of taller buildings on the adjoining Villages of Bethesda townhouse community. He conducted his first study in late 2005, and then conducted an expanded study during the summer of 2006. He used a 3 D computer model program. He concluded from the study that the taller building located along Woodmont Avenue creates early morning deep shadows for about 75% of the Villages of Bethesda community. The proposed development will not create shadows as the existing buildings cause them. In fact, the set back of the 6-story wing helps alleviate the shadow impact on neighboring properties.

Mr. Dayhoff described the parking requirements and site access. The zoning ordinance requires 60 parking spaces to serve the proposed density. The proposed development would include 78 parking spaces located on two below grade parking levels. This parking will exceed the minimum parking requirements and provide 1.3 parking spaces per unit. The parking garage will be accessible by way of West Lane and will be located under the proposed building's northern terrace.

Mr. Dayhoff indicated that no access to the parking garage is proposed by way of Montgomery Lane because the building's southern façade is only 40 feet wide and a garage entrance at this location would take up too much of the façade and would destroy the building's architectural integrity and compatibility. Moreover, even a single lane entrance would require about 20 feet of internal space to negotiate the required turning movements if an access point was located on Montgomery Lane. The West Lane access provides the best internal configuration for the site. The property immediately to the west has an approved development plan under LMA G-779 and that project will locate a 20-foot wide garage entrance way next the proposed development.

Mr. Dayhoff concluded that the access to the site by way of West Lane makes the most sense as it is the best location for service vehicles to load and unload and avoids congestion on West Lane. He pointed out that Montgomery Lane is a two way street up to West Lane. He conceded on cross-examination that he did not consider a driveway access from Montgomery Lane. The West Lane access also allows for larger set backs from the Villages of Bethesda. The proposed access will function better for the building and the neighborhood. He conceded that the Edgemoor high-rise had a garage access from Montgomery Lane but pointed out the

Edgemoor's frontage is over 120 feet and the driveway can be accommodated there in a much more compatible manner than on the Applicant's property.

Mr. Dayhoff indicated that the building is intended to be a "green" building, which is environmentally beneficial to the area. The elements to make the building "green" will be determined at the site plan stage. One of the elements to be considered is a Sedum roof. This type of roof provides for soils to grow vegetation, which will help with storm water management as water drains through the soil and will be absorbed by plants. Other possible elements of the "green" building include use of energy star appliances and local masonry and materials that will shorten transportation.

Mark O'Hara qualified as an expert witness in the field of landscape architecture. He addressed some of the project details as reflected in the development plan. There will be extensive streetscape located along West Lane, Montgomery Lane and the interior of the site including the mews area. The streetscape will include plantings, benches, and art scape.

Mr. O'Hara described the streetscape along the western portion of the project. A 6 foot buffer area is proposed along the western property line to a private terrace located in the rear of the site. A landscape screen of thick, dense evergreen vegetation will provide a year round buffer. He explained that a green screen is a structure attached to the building façade that provides a climbing vine.

Mr. O'Hara indicated that the east side will include brick columns with low freestanding combinations of retaining walls and intermittent fences, some of which may be wrought iron. The streetscape along West Lane and Montgomery Lane will include a 5 foot wide tree panel and 5-foot wide sidewalks. The wide sidewalk is intended to invite pedestrians to use the area. Since Montgomery Lane is a more prominent street, the sidewalk area is proposed to range from 7 to 10 feet. The streetscape at this location will also contain a strip of trees.

Chris Karat, P.E. qualified as an expert witness in the field of transportation planning. He evaluated trip generation rates for the 50 unit proposed development. He used the Bethesda CBD rate of 0.3 trips per unit. He calculated that the a.m. and p.m. peak hours' traffic would both yield 15 trips.

Mr. Karat described the access to the building as a 22-foot wide driveway from West Lane into a garage entrance in the rear of the building. He conceded that the current width of West Lane is variable and reflects an 18 to 19 foot width. He concluded that the street is adequate to accommodate traffic anticipated from the project. He concluded that vehicular access to the site was safe, adequate and efficient.

Mr. Karat indicated that the proximity of Metro to the site and the proposed pedestrian systems means that there are adequate public facilities in place to support the proposed development. He did not conduct a local area transportation review because the project will produce less than 30 peak hour trips and the review is not necessary at this level of impact. He concluded that there are adequate public facilities to accommodate the proposed zoning.

Mr. Karat indicated on cross-examination that West Lane currently reflects about 10 peak hour trips during the a.m. (6:30 to 9:30 a.m.) and p.m. (4 to 7 p.m.) peak hours. He concluded that there is no problem with existing traffic although he did not personally take traffic measurements and he could not ascertain the percentage of truck traffic in the vehicular count. There are 2 curb cuts located along the north side of Montgomery Lane and 3 curb cuts located along the south side.

Charles Irish, P.E., qualified as an expert witness in the field of civil engineering. He supervised the preparation of an engineering report and testified about its contents. The subject property and the surrounding area were inspected and the staff conducted boundary and topographic surveys. He filed an existing conditions plan with the MNCPPC Environmental Planning Division, which exempted the site from forest conservation requirements because of the small size.

Mr. Irish prepared a map of the surrounding area that he concluded would constitute a 1,000-foot radius from the site. The site rises to a high point at its northeast corner at 338 feet above sea level. From this point the property slopes in a southwest direction about 4 to 5% to a low elevation of 328 feet above sea level. Water, sewer, gas and other public facility lines are located within the rights of way for Montgomery and West Lanes and are accessible to the site.

Mr. Irish described storm water management plans, which deal only with water quality issues. The low volume of flow from the site will not require water quantity control. The water quality control will be provided

on site at two locations. The “green” roof will include a layer of soil with plant material on top that will filter water. Also, a water quality control structure will be located underground and filter water before it is released into the public drainage system.

Mr. Irish indicated that sediment control would be handled on site. Silt fences will be located along property lines to insure that adjacent properties are not adversely impacted. The runoff will not leave the site and will go initially into the garage excavation area and then will be channeled to a sediment tank. Clear water is then released into the drainage system. The County Department of Permitting Services will issue a permit before construction begins. He concluded that adequate measures are proposed to prevent soil erosion and preserve natural features of the site. He concluded that the proposed development would not overwhelm facilities, adversely impact on the surrounding area or conflict with the County’s Capital Improvement Program.

Mr. Irish testified that the Applicant would provide all necessary easements and dedications required for this project. The sector plan indicates that Montgomery Lane needs to have a right of way of 52 feet or 26 feet from the centerline of the road. The Applicant will provide dedication of additional rights-of-way to insure the 26-foot right of way on the adjacent portion of Montgomery Lane. The sector plan does not specify a desired width for West Lane. Instead, the Technical Staff’s Transportation Division recommended that the street have a 50-foot right of way. Its current right of way is 45 feet. The Applicant will dedicate 2 ½ feet so the street will reflect a 25 foot right of way from the centerline. The right of way on the other side of the street will be addressed if and when adjacent land is redeveloped.

Mr. Irish concluded that the proposed access to the site by way of West Lane will be safe. He has studied the low traffic level along this road and considered the increased pedestrian traffic that will occur as a result of the proposed development and its pedestrian mews. He concluded that the driveway off West Lane will be much safer for pedestrians and vehicles than direct access to the site from Montgomery Lane. On cross-examination he concluded that fire trucks would be able to negotiate access to the site from West Lane given the length of the road and the ability to maneuver. He noted that the County Fire Marshall approved the proposed access.

## **B. OPPOSITION'S CASE IN CHIEF**

Four adjacent property owners appeared at the hearing and participated in questioning of the Applicant's witnesses.

Bernard Fiskén is a resident of the Villages of Bethesda and is an adjacent and confronting property owner. His home is one of the most affected by the proposed development.

Mr. Fiskén praised the zoning review system and expressed appreciation to a number of people who assisted him in his review of the proposed development. This appreciation included members of Knapp's Technical Staff, the Applicant and its counsel, the Peoples' Counsel, the Montgomery County Civic Federation, the Edgemoor Civic Association and the Bethesda Homeowners Coalition. He also described the Villages of Bethesda as a community of 21 townhouses whose residents participated in the zoning review process in a grass roots manner.

Mr. Fiskén indicated that despite considerable cooperation by the Applicant he did have some concerns about the proposed development. The Applicant has agreed to a number of binding elements that help make the proposal much more palpable. These elements include the evergreen landscape area to replace a grove of oak trees that will be lost to development. He is concerned about the height of the trees to be planted and would like input into both tree height and variety. He is pleased with the Applicant's location of a 20-foot setback area from the Villages of Bethesda. He is also pleased that the Applicant also agreed to a construction agreement.

Mr. Fiskén raised two major concerns. Compatibility needs to be judged by a higher standard in this area of Bethesda because of the lack of open space, the loss of light and air due to the tall buildings in the urban areas and the infill aspects of the project and its impact upon people who already live in the community. He is particularly concerned with the bulk and height of the building as it is located too close to the Villages of Bethesda. The taller structures will cut off the sun from the enjoyment of existing residents of the Villages of Bethesda. Other recent projects in the Arlington Road corridor reflect low scale development. For example, the City Homes project on the south side of Montgomery Lane has a 50-foot height and the Edgemoor will be developed at 46 feet. While the proposed development is not located right on Arlington Road, it is close enough

and adjacent to low scale development. The proposed building heights should be more sensitive to adjacent properties.

Mr. Fiskén also indicated that comparability with existing development is a problem. The building contains 50 units compared to the 21 units in the Villages of Bethesda. Also, the building as it faces its neighbors is six stories in height plus a mechanical room on top while the neighbors are only three stories in height. Building height needs to be evaluated as it relates to adjacent properties and there is a need to preserve as much light and air as possible in this urban environment.

Kathleen Fiskén is Bernard Fiskén's wife and testified that the loss of sunlight is a significant concern. The Applicant's shadow studies show that the project will cause them to lose 368 hours of sunlight every year.

John Wolf attended the hearing and participated in the questioning of the Applicant's witnesses. However, he preferred to submit his concerns in writing rather than make a statement. Relevant portions of his letter in opposition are set forth below.

\* \* \*

My major concern and complaint is the proposed ingress – egress from the proposed new Condominium Building. The plans call for all traffic to use Montgomery Lane and then West Lane (a virtual alley) for entering and exiting the new six (6) story project which proposes 78 parking spaces.

West Lane is now only 18-19 feet wide and currently has problems with traffic flow on normal days. However, traffic in rush hour is a problem when short cut drivers frequently exit Arlington Road in search of a better way. This problem will grow as more development is approved in Bethesda. This intersection is complicated by one way traffic west bound and merges with east bound traffic from Montgomery Lane and West Lane. People stop in mid-intersection out of confusion.

\* \* \*

[Ex. 78, emphasis in original]

Theodore P. Chipouras also participated in the hearing and but did not testify and submitted a letter, the relevant portions of which make the following points.

\* \* \*

Traffic conditions in our immediate neighborhood are already congested and unsafe. The traffic light at Arlington Road and Montgomery Lane is non-standard, operating in a flashing mode until activated by a pedestrian. This causes drivers leaving Montgomery to delay while expecting the light to change. The result is unsafe for both drivers and pedestrians. Further, Montgomery Lane is one-way coming off Woodmont Avenue, but two-way off Arlington Road creating confusion in the middle at the West Lane intersection. West Lane also dead-ends with inadequate turn-around space for trucks or cars. With no parking permitted on either West or Montgomery Lanes, illegally parked vehicles add to frequent bottlenecks.

\* \* \*

Given the current density and planned increases, we feel current design of Holladay's West Lane project has two major deficiencies that will contribute to congestion in our neighborhood.

- It lacks a drop-off lane. Vehicles dropping off or picking up passengers will regularly block travel lanes on both West and Montgomery Lanes. Delivery trucks such as UPS will do the same. A building this size needs to have a drop-off lane.

- The garage entrance and loading dock are located at the furthest point of the property, bringing all of the building's traffic onto West Lane. The property has frontage on Montgomery Lane which would better serve as the main access point.

\* \* \*

[Ex. 79, pp. 1-2]

### **C. PEOPLES' COUNSEL PARTICIPATION**

Martin Klauber, Esq., Montgomery County Peoples' Counsel, participated in the hearing. He asked extensive questions of the Applicant's witness and raised significant concerns about the lack of specificity in the proposed development and its supporting documents. He urged the Applicant to be more specific about density, building height and amenities. As a result, the application was revised to specify the maximum density, building height and amenities. He did not take sides in the case and, therefore, did not offer a recommendation either in support of or in opposition to the application.

### **D. APPLICANT'S REBUTTAL**

The Applicant submitted a written rebuttal by counsel that includes in part the following points:

#### COMPATIBILITY

\* \* \*

In determining the compatibility of the West Lane Project, the Project must be evaluated in the context of the surrounding area, including the overall Transit Station District designated in the Bethesda CBD Sector Plan.... As the Applicant's expert in land planning testified at the public hearing, compatibility is not synonymous with comparability and, as such, the development standards of one project need not be identical to those of an adjacent project in order to find compatibility. Rather, the development standards of each project must be reviewed against the backdrop of the Zoning Ordinance, the applicable Sector Plan, and the surrounding community.

From the conception of the West Lane Project, the Applicant devoted particular attention to the proposed Development Plan to ensure the design of the Project would be compatible with the surrounding area. The Applicant's starting point was a design which complied with the recommendations of the Sector Plan. To this end, the height of the proposed multi-family residential building respects the recommended Sector Plan maximum Height of 65 feet, with a height of approximately 42 feet (four stories) along the southern portion of the building which steps up to the full 65 feet recommended by the Sector Plan ... along the northern portion of the building. The



proposed maximum elevation of the West Lane Project is only 26 feet greater than the Villages of Bethesda, and is due in part to the fact that the 35-foot high Villages of Bethesda townhouses are constructed on top of an above-grade terrace which was designed to read as urban townhouses, in keeping with the "Urban Village" concept promoted by the Sector Plan....The Project's density of 74 units per acre also complies with the Sector Plan's density recommendations for the Transit Station Residential District which range from a minimum of 45 dwelling units and acre to a maximum of 100 units per acre....

In addition to complying strictly with the recommendations of the Sector Plan, the Project also includes extremely generous setbacks from the Villages of Bethesda site, particularly considering the Project's urban location. While a minimum setback of 20 feet is provided from the northern façade of the Project to the blank wall of one of the end units of the Villages of Bethesda, which is located on the Property line, more generous are provided from the row of townhouses in which Mr. Fiskens's residence is located to the northern setback (56 feet) and to the northern corner of the West Lane Project adjacent to the terrace (87 feet). The Project's proposed setbacks are atypical in an urbanized area, and greatly exceed the setbacks provided within the Villages of Bethesda development, where the distances between rows of townhouses range 18 to 22 feet.

The Villages of Bethesda complies with the recommendations of the Sector Plan by providing lower density, three-story townhouse development, which provides an appropriate transition to the single-family uses to the west of Arlington Road. An important function of any Sector Plan is to guide development in an orderly, compatible manner. While the Sector Plan recommends different design standards for the Property and the Villages of Bethesda, these recommendations were carefully considered after a long study period, the input of many groups and individuals, and complete review by the Planning Staff and Planning Board. Compliance of each separate development with the respective recommended design standards set forth in the Sector Plan are presumed to result in projects compatible both with projects on adjoining properties and in the surrounding area. Certainly, in the subject case, there is no evidence to suggest that the two projects, each of which complies with the recommendations of the Sector Plan, would not be compatible.

A critical component in evaluating the compatibility of the Project is the Applicant's commitment, through the Binding Elements on the Development Plan, to various design elements of the Project, including those discussed above. In response to concerns expressed at the public hearing..., the Applicant proposed additional Binding Elements to the Development Plan and included a 3-D Massing Diagram to further describe the massing and number of stories to which the Applicant is prepared to commit. All of these additional items are intended to provide assurance that the essential components of the proposed Project will be constructed. In this light, it is worthwhile to note that the January 2, 2007 letter from Mr. Fiskens identifies those design features that were critical to Villages of Bethesda which he noted are now included within the Binding Elements on the Development Plan.

### SHADOW STUDIES

As the Applicant's expert testified at the public hearing, the overall impact of the shadows from the West Lane Project is very minimal. Throughout the entire year, the afternoon shadows from the West Lane Project are directed away from the Villages of Bethesda. This is a result of the placement of the Project relative to the location of the sun and, therefore, there is no shadow impact during the afternoon. In the early morning winter hours, the existing buildings, including the high rise Edgemoor, already cast shadows on the Villages of Bethesda. Therefore, the shadows cast by the Project will not create any additional impact. It is only during the fall and spring that there will be any shadow impact from the Project. However, given the existing shadows already cast during the fall

and spring by existing buildings, the additional shadow cast by the West Lane Project cover less than five percent of the Villages of Bethesda site. A vast majority of these shadows cast during the fall and spring are directed away from the Villages of Bethesda by noon. The shadow study program employed by the Applicant is widely accepted in the design community....

In evaluating the extent of impacts for shadows created by the West Lane Project, it must be emphasized that it is almost inevitable that new development in and urbanized Central Business District, as well in many of the residential zones, including the R-60 and R-90 zones where the side yard setback is only eight feet, will cast a shadow on existing development on an adjacent property. In fact, it is only in the much less dense zones (such as the R-200 Zone), where a property owner would have a reasonable expectations that the development on an adjacent property would not result in the casting of any shadows on his residence.

### ACCESS

As the Applicant's consultants explained during the public hearing, the decision to locate the access to the building in the northeast corner of the Property was based on many factors and was not simply an aesthetic consideration as suggested by Mr. Wolf.

A primary concern was that of safety. The approved Development Plan No. G-779 for the Rothstein site immediately west of the Property proposed a multifamily building with its driveway onto Montgomery Lane located along the eastern property line, immediately adjacent to the Property. Given the configuration of the West Lane Property and the minimal amount of frontage along Montgomery Lane, any access drive proposed for the Property along Montgomery Lane would be located immediately adjacent to access drive to the Rothstein site, which creates potential vehicular conflicts and presents a safety concern. In this case, the safety concerns are exacerbated by the presence of the low-rise Edge moor's driveway located immediately across the street on the south side of Montgomery Lane, not to mention the driveway to 12 of the City Homes units located further to the east. The concentration of four separate driveways accommodating more than 85 units presents a potentially hazardous situation that should be avoided.

The Applicant worked very closely with the... [MNCPPC] Staff in developing the streetscape for Montgomery Lane. Staff's primary objective was to create a unified streetscape which was not interrupted by vehicular conflict. Early on in the Applicant's discussions with Staff regarding the design of the Project, Staff made it clear that their preference was for the access driveway to be located off West Lane. Staff's objectives for the Montgomery Lane streetscape are similarly reflected in their later recommendations to the Applicant to eliminate the lay by in front of the building.

In response to Mr. Wolf's concerns regarding West Lane's ability to accommodate the peak hour traffic generated from the Project, we note the Applicant's traffic engineer's testimony at the public hearing. As stated, the Project will generate a total of only 15 peak hour trips. Importantly this is only an 8 trip net increase over the trips generated today by the existing special exception uses on the Property. Finally, the existing paving section of West Lane varies between 18 and 18 ½ feet along the frontage of the Property and will be increased to 20-feet along the frontage of the Property following redevelopment of the Project. This 20-foot paving width is equal to the standard paving section for a Tertiary Residential Street as set forth in the Montgomery County Department of Public Works and Transportation Design Standards. In addition, the 20-foot width for two-way movement is the standard relied upon by the Fire Marshall's office for safe access for emergency vehicles.

### LEED CERTIFICATION – ENVIRONMENTAL CONSIDERATIONS

The Development Plan submitted on December 20, 2006 included within Binding Element 19 the Applicant's commitment to provide "green building" elements. Since that time, the Applicant has decided to make an even greater commitment to sustainable green building design by committing to obtain LEED Certification. LEED Certification is the nationally accepted benchmark for the design, construction, and operation of high performance green buildings. This commitment is significant in that it imposes a specific obligation on the Applicant to incorporate a series of environmentally sensitive elements into the building design to ensure that standards for green buildings are satisfied. The commitment is also notable in that the Applicant is one of the few developers within Montgomery County to voluntarily commit to obtaining the LEED Certification, instead of simply agreeing to incorporate certain sustainable elements (fewer than those required for LEED Certification) into the building design.

### COMMUNITY OUTREACH

Since the beginning of the proposed Project, the Applicant has worked diligently to reach out to the surrounding neighbors to solicit their comments and to respond to their concerns. The Applicant's commitment is reflected in many of the Binding Elements which incorporate the design standards and requirements specifically requested by the surrounding neighbors. The Applicant's responsiveness to the surrounding community to assure that the Project is compatible with the existing development is perhaps best illustrated by the fact that only three residents testified at the public hearing and these individuals submitted limited final comments....As Mr. Fisker indicated at the public hearing, the Applicant has developed a positive working relationship with the surrounding property owners. We look forward to the opportunity to continuing to work with the community to assure a successful, compatible Project.

\* \* \*

[Ex. 81, pp. 1- 5]

## **V. ZONING ISSUES**

The TS-R Zone is one of a special variety of floating zones that provide for design specifications as part of a development plan. The successful applicant is afforded considerable design flexibility if performance standards are satisfied. The development plan must contain sufficient precision to fix the limits of development in terms of land use, density and bulk. The development plan plays a critical role in the evaluation of the proposed rezoning because it provides for the design features that govern all post-zoning reviews. For this reason, evaluation of the zoning issues must begin with the development plan and proceed to the requirements of the zoning district itself.

### **A. Performance Specifications**

The District Council must evaluate five specific areas set forth in §59-D-1.61 of the Zoning Ordinance.

1. Compliance with use and density recommendations of the sector plan and conformity with other County plans and policies.

The TS-R Zone establishes the sector plan as a performance factor. The Technical Staff analysis and the testimony of Mr. Landfair establish that the revised development plan, Ex. 77(p), dated Dec. 15, 2006, conforms generally to the 1994 Bethesda CBD Sector Plan. The development plan generally conforms to the land use, density and bulk recommendations of the plan. However, the development plan needs to be revised to specify the minimum density recommended in the sector plan.

Moreover, the proposed development does not conflict with the County's Capital Improvement Program or other County plans or policies. Indeed, the proposal for MPDUs conforms to the County's Housing Policy. The proposal also promotes the transportation policies of the County by locating higher density residential uses within walking distance of Metro.

2. Zoning Requirements, Residential Enhancement and Compatibility.

The revised development plan contains many improvements in the project. However, there are still some uncertainties in the record that need to be clarified. The opposition made a convincing case that compatibility in the urban area of inner Bethesda needs to be evaluated very carefully to insure the highest standards of development. Mistakes in lower density areas might be subject to mitigation, but mistakes in this urban area cannot be easily corrected. The main victims of insensitive development are the residents who live in or nearby the development project.

The proposed building heights of 65 feet at the northern and eastern edges of the site, while technically in conformity with the sector plan, appear to project undue building mass toward the Villages of Bethesda and the single family structures adjacent to the site. The approved but undeveloped property to the west (LMA G-779) was approved for the TS-R Zone with height limits coordinated with building heights of adjacent properties. The Arlington Road heights are limited to 33 feet and the eastern edge of the project next the subject property is limited to 47 feet.

Another concern is the failure to specify on the development plan a commitment to green building components. For example, the Applicant's evidence on its storm water management relied on the drainage

deterrent to be provided by a green roof. The Applicant only committed itself to a review of these issues at the site plan stage. We know from painful experience that non-binding commitments often fail to materialize once the District Council exercises its legislative discretion to approve zoning<sup>3</sup>.

As noted earlier in this report, the Applicant submitted as part of its rebuttal case a commitment to obtain LEEN Certification. The submission of this new evidence during the rebuttal phase of the hearing is highly irregular and causes a fairness problem in the record. There is no one to comment on the evidence. What is LEEN? What is the significance of its certification? How can it be enforced? Why was it not made part of the development plan? This evidence cannot be properly evaluated without a remand.

### 3. Vehicular and Pedestrian Circulation Systems.

The Applicant must establish by the preponderance of evidence that the proposed development proposes a vehicular and pedestrian circulation that is safe, adequate and efficient. The evidence on this issue is at best muddled. Vehicular access to the site is proposed to be by way of West Lane, which by the Applicant's own evidence is not in very good condition. It is a narrow road with between 18 and 19 feet in paved width at some locations and is supposed to carry traffic that could reach a total of 78 vehicles at any one time, since that is the parking provided. This narrow road is proposed to handle resident traffic, service vehicles, garbage trucks and emergency vehicles. The Opposition presented persuasive evidence that this single access poses safety concerns.

West Lane will not be fully operational until the full right of way is acquired and the full width of the road is paved. This goal may take a very long time. In the meantime, the residents and users of West Lane will be stuck with substandard conditions that are not up to the task of safely handling the number of vehicles that may use this street.

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<sup>3</sup> The big difference between the Planning Board's review at site plan and the District Council review at zoning is that site plan review involves the exercise of a narrow and delegated administrative responsibility, Sheetz Inc. v. Frederick City Planning Commission, 106 Md. App. 531, 665 A.2d 327 (1995). The Planning Board only has the authority specifically delegated to it. On the other hand, the District Council exercises the County's full zoning powers. For example, the District Council could deny a zoning application simply because it determined the zoning was premature. The Planning Board possesses no such discretion at the site plan stage.

The Applicant contends the road will be paved to a width of 20 feet (22 feet is the planned width) sometime “following redevelopment of the Project”. Ex. 81, p. 4. Yet the binding elements (no. 17) of the development plan only provide for a paved width of 11 feet from the centerline, without indicating what the full pavement width would be at that point. This conflicting evidence is hardly the level of proof needed to assure the District Council that the only access point to and from the proposed building will be safe, adequate and efficient.

The Applicant utterly failed to show how this system will actually work, especially as traffic will merge with Montgomery Lane traffic, which has a very confusing directional system. All other TS-R projects on Montgomery Lane have access directly to the street. The Applicant simply failed to show in a persuasive manner how the proposed access will work. The record will not permit an affirmative finding on this issue.

#### 4. Preservation of Soil Erosion and Preservation of Natural Features of the site.

The testimony of Mr. Irish, as well as the Technical Staff analysis, indicates that the site design is intended to provide sufficient green space, vegetation and sediment control to meet this performance standard.

#### 5. Perpetual Maintenance of Recreational, Common and Quasi-public areas

The evidence indicates that the Applicant will provide condominium documents that will assure that future homeowners of the project will be responsible for perpetual maintenance of recreational, common and quasi-public areas, Ex. 77 (b), (c) and (d). These documents will be required as part of site plan review.

### **B. Requirements of the TS-R Zone**

The TS-R Zone contains separate specifications that require individual review. The intent and purpose of the TS-R Zone are found in §§59-C-8.21 and 59-C-8.22, and require that the zone be located in areas where multiple-family residential development is recommended by the sector plan and will encourage use of transit stations. The evidence indicates that the proposed development is both recommended for the TS-R Zone by the sector plan and is located within the BTSRD.

The proposed zoning generally meets the technical standards of the TS-R Zone. Section 59-C-8.21 prescribes a minimum lot size of 18,000 square feet and the subject property exceeds this minimum. The

density is proposed at 2.5 FAR, which is the maximum standard. The proposed density of 72 dwelling units per acre is within the density range of a minimum of 45 dwelling units per acre and a maximum of 150 dwelling units per acre. However, since there is no minimum density specified, a reduction in units could frustrate the sector plan objectives. The TS-R Zone requires that 10% of the site be used for public open space and 20% of the site be used for active and passive recreational purposes. These requirements are satisfied.

Notwithstanding the technical compliance with provisions of the TS-R Zone, the Applicant has not provided persuasive evidence that the proposal is totally compatible and proper for the comprehensive and systematic development of the County. The Applicant's project has a number of favorable aspects to it but only partially fulfills the purposes of the TS-R Zone. It appears, based on the present record that the project is premature.

## **VI. CONCLUSIONS**

Based on the foregoing analysis and after a thorough review of the entire record, I make the following conclusions:

### **A. Development Plan**

1. The development plan complies generally with the recommendations contained in the 1994 Bethesda CBD Sector Plan and does not conflict with the General Plan, the County CIP and other county plans or policies;
2. The development plan is unclear as to whether the application proposes a compatible form of development, given the deficiencies outlined in this report;
3. The development plan and supporting evidence fail to establish that a safe, adequate and efficient pedestrian and vehicular circulation system will be provided;
4. The development plan proposes a design that will minimize soil erosion and ensure appropriate natural features through vegetative plantings and landscaping; and
5. The development plan is supported by documents that will adequately and sufficiently provide a method of assuring perpetual maintenance and care for recreational, common and quasi-public areas.

### **B. Zoning Request**

The TS-R Zone at the proposed location will only partially satisfy the zoning requirements.

1. The Applicant has not clearly established by a preponderance of evidence that the proposed use is proper for the comprehensive and systematic development of the County;
2. The Applicant has only partially established that the proposed use is capable of accomplishing the purposes of the TS-R Zone;
3. The proposed development is generally in accord with the sector plan; and
4. The Applicant failed to establish that the proposed development satisfies all the requirements of the TS-R Zone.

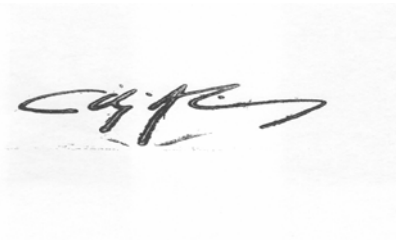
### **VII. RECOMMENDATIONS**

I recommend that the revised development plan, submitted as Ex. 77 (p), be denied in its current form;

I also recommend that Zoning Application No. G-843 for the reclassification from the R-60 Zone to the TS-R Zone of 23,260 Square feet of land known as Lots 24, 25 and 27, Block 13 in the Edgemoor Subdivision and located at 4903 Montgomery Lane and 4831 and 4833 West Lane, Bethesda, Maryland, in the 7th Election District, be deferred until a satisfactory development plan can be prepared and submitted.

I finally recommend that the matter be remanded to the Office of Zoning and Administrative Hearings for such further proceeding as may be necessary.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "P. J. Tierney", is centered on the page. The signature is fluid and cursive.

Philip J. Tierney  
Hearing Examiner